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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

NO. 814

S. DANIELS, L. R. ALLISON and A. J. HANEY, co-partners doing business as DANIELS CONSTRUCTION COMPANY,

Petitioners,

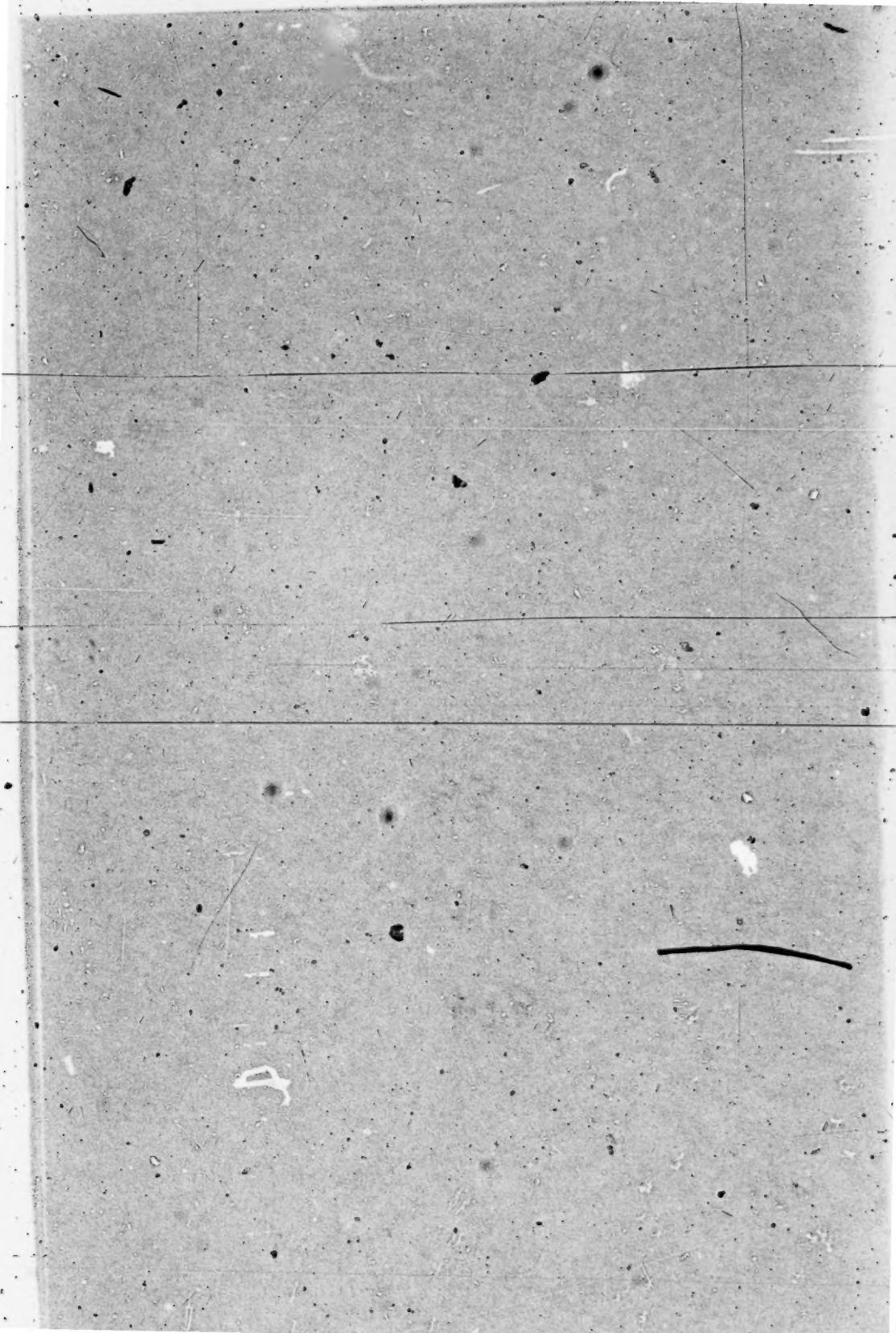
—vs.—

WOODMONT INC., a corporation; CONTINENTAL MATERIALS CORPORATION, formerly CONTINENTAL URANIUM, INC., a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ALLAN E. MECHAM
Attorney for Petitioners
351 South State Street
Salt Lake City, Utah



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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on December 23, 1959.

A. OPINIONS BELOW

The opinion of the trial court (United States District Court for the District of Utah, Central Division) was not

printed in the Federal Supplement Reporter, but it appears on pp. 24-56 of the Record.

The opinion of the lower court (United States Court of Appeals for the Tenth Circuit) appears at 274 F. 2d 132 and is appended in full in Section G of this petition.

B. JURISDICTION BEFORE THIS COURT.

The judgment sought to be reviewed is an opinion of the United States Court of Appeals for the Tenth Circuit, said judgment having been dated and entered on December 23, 1959.

An order denying rehearing was entered February 11, 1960.

An order staying the mandate of the United States Court of appeals for 30 days pending petition for writ of certiorari was signed February 24, 1960.

The statutory provision which confers jurisdiction on this Court to review the judgment below by writ of certiorari is 28 U.S.C. § 1254(1).

C. QUESTION PRESENTED

The question herein presented is whether an earth excavation contractor, having been induced by fraud to enter into a contract, should be denied recovery for damages resulting from the fraud if said contractor executes an amendment to the contract after discovering the inaccuracy of the fraudulent representations without also discovering their fraudulent nature.

D. CONSTITUTIONS, TREATIES, STATUTES

No constitutional provisions, treaties, statutes, ordinances or regulations are involved in this petition.

E. STATEMENT OF THE CASE

Petitioners filed suit against respondents, seeking to recover damages incurred pursuant to an earth excavation contract induced by the fraud of respondents, in the United States District Court for the State of Utah, Central Division, and the court found jurisdiction by reason of diversity of citizenship and an amount in controversy in excess of $3000.00, exclusive of interest and costs (Finding No. 1, R. 24).

The facts are not in issue in this petition. The trial judge, himself, carefully and exhaustively prepared the findings of fact (R. 24-55). These facts were fully affirmed by the Court of Appeals (Appendix). The only facts which need be recited are those which frame the question presented, as set forth in Section C of this petition. Briefly, then, the facts are as follows:

Respondents owned certain uranium mining properties in Utah known as the Rattlesnake Mine, and they desired to surface strip the overburden so as to expose an uranium ore body. Petitioners are earth excavation contractors. Knowing that much of the overburden was hard rock which would require drilling and blasting to remove, respondents falsely represented to petitioners that the overburden was all soft earth that could be removed without drilling or blasting. In reliance on these representations petitioners entered into a contract with respondents for the removal of the overburden material. When the hard rock was en-

countered by petitioners, they thought it was an honest mistake on the part of respondents and feared that they (petitioners) had assumed the risk as to the nature of the overburden. Later, petitioners and respondents amended the orginal contract in some minor particulars for the mutual benefit of both parties. But the amendment did not substantially reduce the loss (occasioned by the hard rock) petitioners were certain to sustain under the terms of the contract. After completion of the entire stripping operation, petitioners discovered that the original representations were fraudulent — not merely inaccurate, but intentionally so — and for the first time discovered that, had they known of such fraud earlier, they could have avoided or rescinded the original contract and thus escaped the loss which they sustained during the stripping operation. The trial court held, however, that all damages sustained subsequent to the amendment, and as a result of the original fraud, were waived by petitioners because, knowing of the hard rock at the time of the amendment, they could in no way continue to rely upon the accuracy of the original representations (Generally, R. 24-56).

The Court of Appeals fully affirmed the trial court's findings of fact, and also affirmed the trial court's conclusion that petitioners could not recover for damages incurred after the amendment because at the time of the amendment there could be no reliance on the accuracy of the original representations (Appendix). The error of this holding is demonstrated in the next section of this petition.

F. REASONS FOR ALLOWING WRIT (ARGUMENT)

THE LOWER COURT ERRED IN HOLDING THAT THE EXECUTION OF AN AMENDMENT TO A CONTRACT INDUCED BY FRAUD BARRED PETITIONERS (PLAINTIFFS)

FROM RECOVERING DAMAGES THEREAFTER RESULTING FROM THE DECEIT, EVEN THOUGH AT THE TIME OF THE AMENDMENT PETITIONERS DID NOT KNOW OF THE FRAUD AND DECEIT.

THE HOLDING OF THE LOWER COURT THUS ESTABLISHES A POLICY OF APPROVING FRAUD AND PROTECTING DEFRAUDERS, AND CREATES A CONFLICT BETWEEN UNITED STATES COURTS OF APPEAL ON THE APPLICABILITY TO DECEIT ACTIONS OF A CASE DECIDED BY THIS HONORABLE COURT.

1. THE DECISION OF THE LOWER COURT IS ANALYTICALLY UNSOUND, AND IS CONTRARY TO LAW.

(a) Introductory

Petitioners file this petition for writ of certiorari because the lower court has made a serious error in applying the law. This petition does not dispute any of the facts recited in the court's opinion, but merely points out a legal error which has far reaching consequences, not only in the result of this case, but by establishing a rule of law contrary to public policy in an area of the law in which there is only one case in point. That case, *United States v. Atlantic Dredging Co.*, 253 U.S. 1 (1920), was decided by this Court in a manner exactly opposite from the case now under petition.

The lower court affirmed the trial court's findings of fact showing that respondents were guilty of actionable deceit by wrongfully inducing petitioners to form and rely upon an erroneous opinion as to the nature of the overburden to be stripped from an uranium ore body. After holding that such deceit, if discovered, would serve as grounds for recovering damages, or avoiding or rescinding the original contract, the court held that a subsequent amendment, after discovery by petitioners that the over-

burden was in fact hard rock, prevented petitioners from recovering damages for removal of the rock subsequent to the amendment. This was so, said the court, because at the time of the amendment there could have been no reliance by petitioners on the earlier fraudulent inducements to the effect that the overburden was soft earth.

But the court also affirmed the trial court's finding that at the time of the amendment petitioners thought they were still bound by the original contract because they reasonably believed that respondents' inducements had been made in good faith and that, though erroneous, such inducements were not deceitful or fraudulent and, therefore, not actionable. Petitioners thus did not know, at the time of the amendment, that they could have avoided or rescinded the original contract and thus escaped the tremendous financial loss which was then apparent as a result of the necessary drilling and blasting to remove the hard rock. The court said that the only reason petitioners entered into the amendment was because they were "concerned with the heavy penalties involved (under the original contract)" and that, since the inevitable loss would probably be less under the amendment than under the original contract, they were "making the most of a hard bargain."

The error committed by the court was in denying petitioners recovery solely upon the fact that, at the time of the amendment, there was no reliance on the earlier fraudulent inducements to the effect that the overburden was soft earth. The court failed to give proper legal effect to the fact that petitioners thought they were still bound by the original contract, and that, while they knew of the hard rock when they entered into the amendment, they did not know that they could have refused to remove the rock at

the contract price per cubic yard (29c), and thus escaped the huge loss foreseen by the necessity of drilling and blasting. Hence, at the time of the amendment the fact of petitioners' non-reliance on the original fraudulent inducements was immaterial, but the fact of petitioners' reasonable belief that they were still bound by the original contract was crucial. The court gave legal effect to the wrong factor, and erroneously denied to petitioners nearly one-half million dollars for removal of hard rock subsequent to the amendment.

(b) Nature of the Deceitful and Fraudulent Inducements.

The court analyzed the nature of the actionable deceit by declaring that:

> "... the trial court's judgment does not rest upon the failure to disclose peculiar knowledge, nor does it turn upon the failure to speak when the Company was at liberty to sit silently by. Rather, the trial court's judgment is based primarily upon positive representations of material facts which the companies actually believed to be untrue. The mischief lies not in the failure to disclose peculiar knowledge, but in actually inducing the contractor to contract with the knowledge or belief that it was laboring under a misapprehension of the material facts. It is indeed the law in Utah as elsewhere that positive assertions to induce a contract which the maker reasonably believes to be untrue constitutes fraud and deceit. See Pace v. Parrish, 247 P. 2d 272; Leasure v. Hughes, 178 Pac. 696; First National Bank of Coyle v. Horsley, 49 P. 2d 495." (Appendix, p. 35)

The court then analyzed the evidence showing that respondents' Vice President Sullivan and Manager Pruess believed that much of the overburden was hard rock, but that they deceitfully induced the contractors (petitioners) to

believe it was soft earth which could all be removed without drilling and blasting, and affirmed the trial court's findings by saying:

> "From all of this, the trial court concluded that at the time of the May 17 meeting, Sullivan and Pruess reasonably knew that the contractors were assuming that the material to be excavated could be moved by earth-moving machinery, and believing such assumption to be untrue, actively induced the contractors to contract on that basis. These purposeful misrepresentations and inducements to contract under a misapprehension of the material facts constituted actionable deceit, and since in these circumstances, the information and acts of Sullivan and Pruess were the information and acts of the companies whom they represented, the findings and conclusions of the trial court in this respect are clearly correct." (Appendix, p. 37)

The court also affirmed the trial court's finding that although petitioners learned of the inaccuracy of respondents' representations when the hard rock was encountered, plaintiffs did not know until after the entire project was completed that the inducements were in fact fraudulent:

> "The claim stated, and the trial court found, that in reliance upon these representations, the contractor bid 29c per cubic yard for the excavation work; that after removing approximately two-thirds of the material, and in the early part of 1956, it encountered sandstone or hard rock necessitating drilling and blasting; that at the time it became aware of the inaccuracy of the misrepresentations, *but did not know that they had been deceitfully made;* that proceeding on the theory of mutual mistake, it pursued their contract at great cost after having asserted its intention to claim extra compensation for the removal of the hard rock; and that it did not know the representations were knowingly false until revealed by discovery proceedings after the institution of the suit." (emphasis supplied)

(c) THE AMENDMENT

With regard to the amendment after encountering the rock, the court stated that petitioners and respondents were prompted to execute such amendment because:

> "The contractor (petitioners) was concerned with the heavy penalties involved, and the Company (respondents) was apparently concerned lest ore would not be available for its projected mill."

This is simply an affirmation of the trial court's Findings 39 and 41 (R. 38-39), wherein petitioners' evaluation of their legal position was thus summarized:

> ". . . plaintiffs (petitioners) assuming that the hard rock had been unanticipated by all parties as a mutual mistake for which defendants (respondents) could well make concessions by way of increased price or otherwise, but which they possibly could not be forced to do under the law, and for which plaintiffs were unwilling to run the risk of stoppage of the work in view of the heavy financial consequences that might be visited upon them should their position prove to be unsound."

The above finding of the trial court and its affirmation by the lower court is well founded. Petitioners expressed a theory of mutual mistake as their strongest legal position, but did not dare risk discontinuing the stripping under a declaration of rescission because their theory might not prove well-founded. This was so because:

> (a) The contract recited that petitioners had examined "all available data" and were, in effect, assuming the risks as to the nature of the overburden;
>
> (b) The contract required petitioners to continue stripping in the event of any dispute under the contract;

(c) Petitioners were repeatedly admonished to continue stripping;

(d) Had petitioners' attempt to rescind proven not well taken, they would have suffered (1) substantial damages for breach of contract or, if they later resumed the work, substantial liquidated damages under the contract for delay in completing the stripping, and (2) other special damages, since it had been "brought home" to petitioners that respondents were relying on obtaining ore at the contract deadline for a projected mill;

(e) Petitioners could not afford to risk their good name with bonding companies by abandoning a job without legal justification.

In summary, petitioners' reasonable belief that respondents had acted in good faith and that the hard rock represented no more than a mutual mistake did not apprise petitioners of their legal rights arising from actionable deceit. The "mutual mistake" theory was so weak, but the "fraud" theory was so strong, had petitioners known of the deceit, they never would have signed the amendment. Petitioners believed that in all probability they were still bound by the original contract, and their concern was over the "heavy penalties" thereunder. The court described that amendment in the following language:

> "In any event, after negotiations, the parties amended their original contract to provide that the contractor would concentrate on the excavation of one-half of the pit area to insure the availability of ore on the completion date; and that the contractor would be allowed one day additional time for each day he completed that part of the pit area ahead of the date fixed for the completion of the contract. The contractor also agreed to drill, blast and remove additional sandstone adjacent to but outside the original pit area not contemplated by the original contract; and the Company agreed that in addition to the 29c

provided for in the contract, it would pay $1.03 per foot of hole drilled; and it was further agreed that 'no additional amount shall be payable for any blasting other than that provided for in this paragraph.'" (Appendix, p. 28)

(d) THE COURT RESTED ITS OPINION SOLELY UPON NON-RELIANCE.

The legal theory of petitioners was accurately stated by the court:

> "The appellees (petitioners) have appealed from that part of the judgment which denies recovery for the reasonable value of the entire 705,622 cubic yards of hard rock. The contention is to the effect that they could not have waived or contracted away the fraud until it was discovered after the contract was fully performed. They say that after discovery of the true facts, but not the fraud, they proceeded to perform the contract under an assumed mutual mistake of fact and at the risk of heavy penalties for failure to complete on time; that had it known of the deceit, it would not have acted as it did in making the amendment; and that the amendment is thus infected by the original deceit and cannot operate to preclude full recovery for fraud and deceit in the inducement of the contract, citing United States v. Atlantic Dredging Company, 253 U.S. 1." (Appendix, p. 39)

But the court then followed the erroneous reasoning of the trial court, holding that knowledge of the original deception was immaterial at the time of the amendment because, at that time, there could no longer be any reliance on the accuracy of such deceitful inducements:

> "The trial court recognized . . . that an amendment to a contract which is tainted with the fraud of the original contract is also a nullity. The court reasoned, however, that the contractor's ignorance of the Company's deception was immaterial after the March amendment; for inasmuch as the contractor

knew the exact nature of the material to be encountered, and received additional consideration by way of an extension of time, it could under no 'stretch of the imagination' be said to be relying upon the original misrepresentations in agreeing to the amendment. In the words of the trial court, the contractor could not recover damages for the period following the March 17 amendment 'not because there had been a full discovery of the fraud on that date, but because there had been a new contract with additional considerations prospectively operating which the plaintiffs cannot question because they then had no right to rely on the original misrepresentations. It didn't matter whether plaintiffs knew that the original misrepresentation was intentionally deceitful or not.' Thus, the trial court's judgment with respect to prospective damages was made to rest squarely upon the absence of the essential element of reliance, Pace v. Parrish, 247 P. 2d 273; Restatement Torts, § 537, not upon a waiver of the fraud. The March amendment did not constitute a waiver but positive evidence of non-reliance." (Appendix, pp. 39-40)

The court concluded its approval of the trial court's erroneous reasoning by saying that petitioners could recover for hard rock removed prior to the amendment because they didn't know of the fraud (though they did know of the hard rock), but that petitioners could not recover for hard rock removed after the amendment because, though still not knowing of the fraud, they no longer relied on the fraudulent inducements:

> ". . . it is sufficient to say that the contractor could not have waived the fraud until it was discovered, and it could not be precluded from recovering upon it until it ceased to rely upon it. Since admittedly the contractor did not discover the fraud until after the performance of the contract and did not rely upon it after the March amendment, the trial court's judgment is clearly right." (Appendix, p. 42)

(e) The Analytical Error of the Lower Court

The error committed by the court is a serious one. It was clearly recognized by the court that fraud cannot be waived until discovered, and that plaintiffs can recover for for fraud until they cease to rely upon it. And then the court said that petitioners did not rely on the fraud when they executed the amendment. *We believe that conclusion is wrong.*

The effect of the prior fraudulent inducements continued to exist. At the time of the amendment petitioners were not relying on the accuracy of such representations, but were compelled by the seemingy inextricable legal position in which they found themselves under the original contract to make the best of what apparently was a bad bargain. True, they knew of the hard rock in the overburden and no longer relied upon the accuracy of the original representations. But they were fraudulently induced to enter into the original contract, *and at the time of the amendment they reasonably believed that they were still bound by the original contract.*

Thus, petitioners relied on fraudulent inducements when they entered into the original contract, and the *sole reason* for entering into the amendment, *as recognized by both the trial court and the lower court*, was to escape the "heavy penalties" under the original contract and to make the most of their "hard bargain." If, upon discovery of the hard rock, petitioners foresaw a seemingly inevitable loss in excess of one-half million dollars under the original contract (by which they reasonably believed they were bound), and sought to reduce that loss to something less by executing the amendment, how can it be said that

petitioners' conduct was no longer governed by the original fraudulent inducements? *Such a conclusion defies all reason!* They entered into the original contract in reliance upon fraudulent inducements, and later entered into the amendment because of the penalties provided for in the original contract which they did not know they could avoid. The reliance still existed—it simply had taken another form. Originally, the *reliance* was upon the *accuracy* of the fraudulent inducements, but at the time of the amendment the *reliance* was upon the apparent *binding nature* of the original contract, and the heavy penalties thereunder. Absent the original fraudulent inducements, there would have been no contract (at least, no contract based upon an assumption of soft earth). Hence, there would have been no "heavy penalties" to compel petitioners to enter into an amendment. The amendment was the exclusive product of the original fraudulent inducements.

The reasoning of the court would be meritorious if petitioners had discovered (1) the inaccuracy of the representations, *and* (2) the fraudulent and deceitful nature of such representations. Then, petitioners would have been aware of their right to avoid or rescind the contract, and would have known that they were not bound by the provisions of the original contract. In such a situation, they would have been free to negotiate an amendment and could not have relied on either the accuracy of the original representations or the binding nature of the original contract. Petitioners then, contracting freely, could not recover for any losses resulting from subsequent removal of the hard rock. *But such was not the case, and the lower court found such was not the case.*

Simply for purposes of analysis, it is clear that petitioners might have executed an amendment with at least

three different degrees of knowledge concerning the original fraudulent inducements:

> 1. Petitioners might have had no knowledge of either the (a) inaccuracy, or the (b) deceitful nature of the representations. In such a situation, reliance would continue and an amendment would not be a bar to subsequent recovery.
>
> 2. Petitioners might have had knowledge of both the (a) inaccuracy and the (b) deceitful nature of the representations. The execution of an amendment in such a situation would be a bar because petitioners would know the true facts and their legal rights.
>
> 3. Petitioners might have had knowledge of the (a) inaccuracy, but not the (b) deceitful nature of the representations. This was the situation found to exist in the instant case by the trial court, and affirmed by the lower court. Obviously, in such a situation, an amendment is not a bar unless discovery of the inaccuracy is also notice of the deceit. But it has been found that petitioners reasonably assumed that the contract was still binding and they were not apprised of their right to avoid or rescind.

From the foregoing analysis, it is clear that the lower court has, in legal effect, treated the instant case as No. (2), after finding the facts to be as in No. (3). This, we submit, was error.

2. The Opinion of the Lower Court Creates a Conflict Between United States Courts of Appeal and is Contrary to an Opinion of this Honorable Court.

While there are many cases dealing with fraud and deceit, there is a striking paucity of decisions applicable to the instant fact situation. The reason that the cases dealing

with fraud and deceit are not applicable is because they present no fact situation wherein a defrauded party, subsequent to consummation of a contract induced by fraud, (1) discovers the inaccuracy of the representations without being put on notice of the fraud, and then (2) executes an amendment adjusting the difficulties encountered by discovery of the inaccuracy of the fraudulent representations, and thereafter (3) discovers the fraud and, for the first time, his right to avoid the penalties of the original contract.

In fact, the only case in point with the instant fact situation is *United States v. Atlantic Dredging Company*, 253 U.S. 1 (1920), decided by this honorable Court. In the *Atlantic Dredging* case the plaintiff entered into a contract with the United States, whereby plaintiff was to dredge an area in the Delaware River. The United States prepared certain specifications which stated the depth to which the channel was to be dredged and which also listed the material to be dredged as soft mud and fine sand. The United States had made certain "test borings" and "wash borings" which revealed the probability that the material to be excavated was compacted sand and gravel, rather than soft mud and fine sand. Plaintiff did not know of these borings. (These facts are almost identical to the instant case.)

Plaintiff in that case had equipment which was sufficient to excavate soft mud and fine sand, but did not have equipment capable of excavating the harder compacted sand and gravel. Therefore, when plaintiff began the dredging process and discovered that the material was not as represented, but was much harder compacted sand and gravel, plaintiff could not perform the dredging and

was forced to engage the services of another company which had heavier equipment capable of dredging the material encountered. After plaintiff (assisted by the company plaintiff had employed) had been at work for some time under the original contract, it complained to defendant (United States) that the nature and character of the material encountered was different from that represened, thus making the dredging costs much higher than anticipated. (This fact also is identical to the instant case.) Thereupon plaintiff and the United States entered into an *amended contract* which recited that in view of the fact that compacted sand and gravel had been encountered, and because of the increased cost and difficulty of dredging, plaintiff could deposit the material excavated in the Delaware River, rather than on the shore as had been provided in the original contract. (This fact of amendment is also identical to the instant case.)

At the time the amendment was entered into plaintiff had full knowledge that the material encountered was different from the material represented, and that the specifications were thus inaccurate, but plaintiff had no knowledge that the United States prior to the original contract had made "test borings" and "wash borings" which revealed the probability that compacted sand and gravel would be encountered. (These facts are also identical to the instant case.)

Upon learning of such borings in December, 1915, plaintiff discontinued work and declined to do further work under the contract, and thereafter presented its claim for damages resulting from misrepresentation and concealment (petitioners, in the instant case, did not learn of fraud and concealment until work was fully competed

(R. 50)). The United States defended against plaintiff's claim on the ground that plaintiff had such knowledge prior to entering into the amendment to the contract by which plainiff was granted additional concessions, and that even if there were misrepresentation and concealment on the part of the United States, plaintiff by continuing to excavate and *by entering into the amendment* to the contract had thereby waived any damages for misrepresentation and concealment (same as instant case.) The Supreme Court of the United States responded to defendant's argument as follows:

> "The assumption [that there was waiver of the fraud] and the extent of it and the conclusion from it are not justified. *It is true the company discovered that the material there encountered was different in character from that represented, but the company did not know of the concealment of the actual test of the borings, and the fact that it, the company, attempted to struggle on against the difficult conditions with its insufficient plant should not be charged against it.* In other words, it should not now be held to have been put to the suggested election. It did not know at that time of the manner in which the 'test borings' had been made. Upon learning that they had been made by the probe method, it then elected to go no further with the work: that is, upon discovering that the *belief* expressed was not justified and was in fact a deception. And it was not the less so because its impulse was not sinister or fraudulent." 64 L.Ed. 738. (Emphasis added)

The United States Supreme Court therefore allowed plaintiff full recovery for damages resulting from the misrepresentation and concealment of the United States, and, in so doing, expressly held that plaintiff's knowledge that defendant's representations made prior to the original contract were inaccurate, coupled with plaintiff's consum-

mation of an amendment to the original contract with full knowledge of the true nature of the material to be dredged, *did not waive a right to recover damages for misrepresentation if plaintiff had no knowledge that the misrepresentation was accomplished by the intentional concealment.*

The trial court cited the *Atlantic Dredging* case, recognizing that it was very similar to the instant case, but distinguished it by stating that the contract in that case was not amended as in the instant case (Par. 10, R. 52). The trial judge misread the case, and was in error, for the *Atlantic Dredging* case, as demonstrated above, had an amendment virtually identical to the amendment in the instant case.

The lower court did not follow the same distinction as that suggested by the trial court in refusing to apply the law of the *Atlantic Dredging* case, but adopted a different, though equally fallacious, distinction. It said that the facts of the *Atlantic Dredging* case were "strikingly similar to our own" and although the "contractor relied on the government's misrepresentations," the element of reliance was not in that case an essential element because the action was on contract and not in deceit.

The distinction suggested by the lower court is certainly not a sound one. The *Atlantic Dredging* case stands for the proposition, as recognized by the lower court, that "continued performance of the contract after knowledge of the true facts and until the deception was discovered, did not bar recovery." And as a matter of fact, the amendment in the *Atlantic Dredging* case was executed after a discovery of the true facts and before a discovery of the deception. The fact that a discovery of the true facts did

not apprise the contractor in that case of the deception and hence of its right to avoid or rescind led the United States Supreme Court to say that an amendment could not be a bar when the contractor could not reasonably evaluate his legal rights at the time of the amendment.

Furthermore, reliance *was* an essential element in the *Atlantic Dredging* case. Not because the action was for deceit (which it wasn't), but because reliance was an essential part of causation to show damages. Damages claimed must be a result of the misrepresentation. Hence, there must be reliance on the misrepresentation or the damages are not a result of the misrepresentation. In the *Atlantic Dredging* case the contractor relied on the misrepresentation, and was thereby induced to submit a low bid. When he discovered the compacted, hard material, he executed an amendment, relying, not upon the accuracy of the representations (then known to be erroneous), but upon the supposedly binding nature of the original contract. Upon discovery of the concealment of certain borings by the government, the contractor first learned of his right to rescind and so he did no more work under the contract. In the case at bar, similar discovery came after completion of the entire stripping operation. The facts in the case at bar are the same as the *Atlantic Dredging* case, and the legal conclusions should be the same, particularly with reference to reliance.

The distinction applied by the lower court is simply that the *Atlantic Dredging* case was an action for breach of warranty and not deceit, and that the fraud or "bad faith" element was missing from the *Atlantic Dredging* case. But petitioners fail to see any reason why such a "distinction" should permit the bad faith defendant to

receive more liberal treatment than the good faith defendant. Accordingly, it is not surprising that the courts generally have applied the *Atlantic Dredging* case to fraud and deceit actions. The lower court, in rejecting the applicability of the *Atlantic Dredging* case, has taken a position contrary to that of the United States Courts of Appeal for the Third and Sixth Circuits. The fact situations in the following cases are not on all fours with the instant case, but the decisions are very clear to the effect that the *Atlantic Dredging* case is applicable to deceit actions:

(a) *City of Reading v. Rae*, 106 F.2d 458 (3rd Cir. 1939) (Cert. Denied 60 S. Ct. 145). In holding that "the appellee possessed the right to rescind the contract for *fraud*," the Third Circuit cited as authority the *Atlantic Dredging* case (at page 462.)

(b) *Passaic Valley S. Com'rs v. Holbrook, et al*, 6 F.2d 721 (3rd Cir. 1925). Defendant made certain representations as to earth formations, which, though involving no sinister intent, were inaccurate. The court said this was "technically fraudulent," and the issue to be decided was whether defendant could protect itself by providing that if the representations were not correct there would be no claim by the contractor against defendants. The court cited as "controlling" the *Atlantic Dredging case*:

> "The last case on the subject and one containing facts which resemble closely those of the instant case is *United States v. Atlantic Dredging Co.*, 253 U.S. 1, 40 S. Ct. 423 64 L. Ed. 735, where the self-exonerating clause in the contract there in question was similar to and just as strong as the clause here in question. In that case the Supreme Court, citing its previous decisions, announced the law that, when a governmental body has asked for bids for excavation work and has represented the condition of the material to be excavated, *and in its representations has misstated facts, or*

failed to state facts, within its knowledge, it cannot escape responsibility by a clause of the contract in which it required bidders to examine the work for themselves and in which it said that its statements of facts were but expressions of its opinions and that it did not guarantee them. *This, in effect, was a holding that* representations made in such circumstances import a warranty, and also that, in consonance with familiar law, *a person cannot contract against his own fraud."* (at page 724) (emphasis added).

(c) *Grand Trunk Western R. Co. v. H. W. Nelson Co.,* 116 F.2d 823 (6th Cir. 1941). The court held that where a *defrauded* party has partially discharged his obligation before discovering the fraud, he may continue with the work without being put to an election of remedies or being charged with a waiver of any rights. In support of this holding, the court at page 833 cites the *Atlantic Dredging* case. (See also, 80 F.2d 990)

Petitioners do not suggest that the *Atlantic Dredging* case is controlling as to Utah law. But it is the only case cited by any party which is in point with the instant case. The lower court cited no case, no treatise, and no authority of any kind to sustain its holding, i.e., that a party cannot recover damages under a contract induced by fraud, and the provisions of which serve as the sole motive for the defrauded party entering into an amendment to limit his loss under the contract, without knowing of the deceit or his right to rescind or avoid the contract. In fact, not only is there no authority cited to sustain such a holding, but in view of the unsound analytical position of such a holding and in view of the fact that such a holding protects defrauders and encourages fraud and deceit, petitioners submit that there is not jurisdiction in

the United States which would knowingly apply such a rule of law.

Petitioners are also aware that the Utah Supreme Court can, when an appropriate fact situation comes before it, reject the Court of Appeals opinion and determine for itself what the Utah law is. But such fact situations are few and far between, as evidenced by the fact that the *Atlantic Dredging* case is the only decision of record found by any party which is in point. Therefore, it is clear that any reported decisions on the issue in question will have considerable effect and influence on future cases anywhere within the United States, and to that extent the decision of the lower court in this case will have far reaching consequences exending beyond the boundaries of Utah and beyond the jurisdiction of the Tenth Circuit. It is for this reason, as well as others discussed herein, that this honorable Court should issue a writ of certiorari to the Court of Appeals for the Tenth Circuit and review the rule of law in this case and issue a decision consistent with sound analysis and public policy.

3. The Opinion of the Lower Court is Contrary to Public Policy.

The Lower Court has held that when a contract is induced by fraud any amendment thereto is a bar to recovery of subsequent damages if the defrauded party knew at the time of the amendment of the inaccuracy of the original fraudulent representations, but did not know of the deceit. Such a rule of law serves to condone deceit, protect defrauders, and encourage falsehood and misrepresentation.

The harmful effect of such a rule can be illustrated in many different applications, but perhaps the simplest

illustration is the type of fact situation presented to this Court — earth excavation in construction contracts. Under the rule pronounced by the lower court a person could perform sufficient discovery borings and tests to ascertain the nature of sub-surface conditions and still would be free to employ deceitful and fraudulent mispresentations to induce a contractor to form an erroneous opinion and, in reliance thereon, submit an unrealistically low bid for earth excavation work. When the contractor subsequently discovers that the sub-surface conditions are different from those represented, the defrauder need merely assure the contractor that everyone had been honest but mistaken, that the presence of unexpected sub-surface difficulties is one of the risks assumed by the contractor, and that the contract is still binding. The defrauder can then "generously" offer some minor additional "concession" to the contractor and incorporate this concession as an amendment to the original contract. The original contract price plus the concession thus granted can be far below the reasonable value of the work which the contractor performs. But the contractor is now forever barred from recovering damages subsequent to the amendment. This is so because even though the contractor does not yet know of the deceit, nor of his legal right to rescind or avoid the contract, he did know of the true nature of the sub-surface conditions at the time that the "concession" was incorporated as an amendment to the contract and thus could not rely upon the accuracy of the original fraudulent inducements.

The benefit to the defrauder in such a situation is obvious, and is very well illustrated by the instant case. Respondents received the benefit of the excavation performed by petitioners, and if respondents were required

to pay the reasonable value of the work performed (as determined by the trial court), they would have to pay nearly one-half million dollars more. This simply illustrates the fact that if respondents had been honest in their contractual dealings with petitioners, respondents would have had to pay the reasonable value of the work performed for them, but their fraud has secured to them a half-million dollar benefit. Certainly, one would be encouraged to practice fraud and deceit for such a rich financial reward, and it would be comforting to know that as soon as some concession or consideration is given by way of amendment to the contract, and before the deceit is discovered, there will be a permanent insulation from tort liability and from the payment of any additional damages. And this rule of law, which we believe to be contrary to all reason and policy, is supported by the lower court on the theory that at the time of amendment there can be no reliance on the original fraudulent inducements (while in fact the sole inducement for entering into the amendment is the belief that the original contract is binding and a concern for the heavy losses to be sustained thereunder).

Summary of Argument

The lower court has pronounced a rule of law which is analytically unsound and contrary to every policy and purpose of the law. In so doing, the court rejected the opinion of this Court in the *Atlantic Dredging* case and thus created a conflict in judicial decisions between the Court of Appeals for the Tenth Circuit and the Courts of Appeal for the Third and Sixth Circuits as to the applicability of the *Atlantic Dredging* case to deceit actions. Since the issue presented to this Court is, at least techni-

cally, one of first impression in any court of record anywhere in the United States, the opinion of the lower court will, unless corrected, have a substantial impact on similar fact situations throughout the United States.

Respectfully Submitted,

ALLAN E. MECHAM
Attorney for Petitioners
351 South State Street
Salt Lake City, Utah

G. APPENDIX

The opinion of the trial court appears on pp. 24-56 of the Record. The memorandum discussion appears between the findings of fact and conclusions of law, at pp. 45-53 of the record.

The opinion of the United States Court of Appeals for the Tenth Circuit, officially reported at 274 F. 2d 132, is set forth in full below:

This is an appeal and cross appeal from a judgment in a diversity action for damages based upon actionable misrepresentations in the execution of a contract. Federal jurisdiction is concededly present. By the terms of the contract of June 20, 1955, as amended, the plaintiff-appellee, Daniels Construction Company, agreed with appellant, Woodmont, Inc. to excavate approximately 2,500,000 cubic yards of overburden for the strip mining of a uranium ore mine in Utah for 29c per cubic yard. Appellant, Continental Materials Corporation, the parent company of Woodmont, guaranteed Woodmont's performance of the contract. The contract pertinently provided that the contractor "is not relying upon any representations or promises of the Company except those contained in this agreement"; and that "There are no previous or contemporary representations or warranties of the Company or the contractor not set forth herein." The contract also pertinently provided for heavy penalties for failure to complete the contract on the specified date.

The first part of the work progressed as expected, but about the first of December, the contractor encountered unanticipated rock or sandstone, and thereupon indicated that it would expect additional compensation, but made

no formal demands in that respect. About the middle of February, it was definitely determined that the last sixty to ninety feet of material was hard sandstone rock which could be removed only by systematic drilling and blasting. About this time, apparently both parties became concerned with the possibility that the contractor would not be able to complete the contract on time. The contractor was concerned with the heavy penalties involved, and the Company was apparently concerned lest ore would not be available for its projected mill.

In any event, after negotiations, the parties amended their oringinal contract to provide that the contractor would concentrate on the excavation of one-half of the pit area to insure the availability of ore on the completion date; and that the contractor would be allowed one day additional time for each day he completed that part of the pit area ahead of the date fixed for the completion of the contract. The contractor also agreed to drill, blast and remove additional sandstone adjacent to but outside the original pit area not contemplated by the original contract; and the Company agreed that in addition to the 29c provided for in the contract, it would pay $1.03 per foot of hole drilled; and it was further agreed that "no additional amount shall be payable for any blasting other than that provided for in this paragraph."

The amendment, drafted by the Company's legal department, was signed by its field manager Pruess on March 17, 1956, and was signed by partner Daniels for the appellees on March 20. On that date, Daniels mailed to the Company a letter previously prepared by his legal counsel in which it was stated that "our contract price was of course fixed upon the assumption that the data

which you furnished us regarding the formation here was correct. We of course realize that you were under the impression that your data was also correct and we do not mean to intimate any question of bad faith on your part." And, further, that "The presence of this bedrock has, as you know, materially increased the cost of our operation, and although we are going ahead with the removal of the overburden pursuant to your orders, we wish it clearly understood that we are doing this with the reservation of our rights to call on you for additional compensation in a reasonable amount to compensate us for this increased cost." The letter went on to state that appellees had been advised that in cases of this kind where it had been a "mutual mistake of fact," they were within their legal rights in insisting upon additional compensation "in excess of the unit price specified in our contract."

On the following April 11, the legal department for Continental replied, expressing surprise at the letter in view of the provisions of the March 17 amendment, to which they consented "in order to settle the very claims which you are now reopening in your letter of March 20, 1956; that "we find ourselves in the position of having once settled what we considered a groundless claim and now having the claim asserted once again * * *."

The claims with respect to additional compensation for excavation were not pressed further and the contractor continued to remove the overburden in accordance with the amendment and to accept payment by monthly check with an attached voucher reciting that it was "in full settlement of account below. If not correct return without alterations and state differences."

In October 1956, the original contract was again amended to provide for additional stripping caused by a landslide, at 50c per cubic yard instead of 29c. When the contract was completed, the final check in payment of the contract price was accompanied by a letter, calling attention to a paragraph in the contract providing that acceptance of the final payment by the contractor would constitute a release and waiver of all claims by the contractor against the Company. The contractor returned the check and later accepted it only when the Company had agreed that the acceptance would not effect a release or waiver. This suit was brought to recover the loss of bargain caused by the additional cost of excavating the hard rock which the contractor did not anticipate when the contract was executed.

The claim was stated on several different theories, but the trial court's judgment is based upon actionable misrepresentations of responsible agents of the appellant companies to the contractor to the effect that with the exception of the designated boulder area, the overburden to be excavated was capable of being moved by the use of heavy dirt-moving equipment without drilling or blasting. The claim stated, and the trial court found, that in reliance upon these representations, the contractor bid 29c per cubic yard for the excavation work; that after removing approximately two-thirds of the material, and in the early part of 1956, it encountered sandstone or hard rock necessitating drilling and blasting; that at that time it became aware of the inaccuracy of the misrepresentations, but did not know that they had been deceitfully made; that proceeding on the theory of mutual mistake, it pursued their contract at great cost after having asserted its intention to claim extra compensation for the removal of the hard rock; and that it did not know the

representations were knowingly false until revealed by discovery proceedings after the institution of this suit.

More specifically, the court found from credible testimony that when the contractor-partners visited the mine site preparatory to bidding, they were shown about the vicinity by Latham and Bailey, responsible field representatives of the companies; that they inspected the surface of the area to be excavated, examined exploratory plug drilling reports; talked to the drillers, and were told by Latham and Bailey that, "(a) except for the said area of boulders which could be seen upon the surface of the area to be stripped, the material to be excavated could be removed with earth-moving equipment without the necessity of drilling and blasting; (b) that the material to be stripped from the large north pit upon which the plaintiffs proposed to bid would be substantially the same kind of material insofar as required method of stripping was concerned as that which had been removed from the small south pit and that this latter material had been removed by using earth-moving equipment and without drilling and blasting, except for the boulder area."

The court found that Latham and Bailey made these representations in the honest belief that they were true, but that the companies' boards of directors knew or had good reason to know that they were untrue and that the contractor relied upon them when it submitted its bid and entered into the basic contract. The specific finding in that regard is to the effect that while the directors had no "positive knowledge" of the extent of the hard rock formation, they were convinced from reports of Vice-President Sullivan, in charge of exploratory operations, and general manager Pruess, that large quantities of hard

rock would be encountered; that from the lowness of the contractor's bid and other circumstances, they knew or had reason to know that the contractor was unaware of the hard rock and could not reasonably be expected to know of it. From this the trial court concluded that the companies fraudulently induced the execution of the contract by actively encouraging the contractors to erroneously assume that the material to be excavated could be removed by their heavy earth-moving equipment.

The companies seem to acknowledge a duty to disclose any pertinent information which was available to them and unavailable to the contractor in the exercise of reasonable care at the risk of being actionably deceptive. Indeed, this seems to be the modern concept of tort liability in cases of this kind. See Prosser, Torts, §87, p. 532 (2d Ed.); Keeton, Actionable Misrepresentations, 1 Okla. L. Rev. 21. The companies emphatically deny, however, that they knew of the existence of hard rock. They say with emphasis that they had no more than an opinion, gathered from data which was equally available to all parties; that they were under no duty to point out or call attention to obvious business risks to these experienced earth-moving contractors. Particularly, they say the representatives of Latham and Bailey were statements of opinion and so understood and acted upon; that in any event, they were admittedly made in good faith, hence nonactionable; and moreover, the companies' boards of directors had no actual knowledge of such representations and could not be constructively charged with such knowledge so as to constitute scienter.

We agree with the trial court that the representations of Latham and Bailey were more than mere expressions

of opinion. They were intended to give assurance to the contractor. But they were made in good faith, and to be sure were in themselves nonactionable although the contractor relied upon them to its detriment. As for the directors, there is nothing in the record to indicate that they actually knew that contractors were relying upon Laham's and Bailey's representations as a basis for their misapprehension. And while in some cases, a corporation may be held constructively responsible for the composite knowledge of all of its agents, whether acting in unison or not, see Sawyer v. Midcontinent Petroleum Corp., 236 F.2d 518; Inland Freight Lines v. United States, 191 F.2d 313, we are unwilling to apply the rule to fix liability where, as here, intent is an essential ingredient of tort liability as for deceit. See Restatement, Agency 2d, §275, Comment b.

The drilling reports upon which both the contractor and Latham and Bailey relied as indicating the nature of the overburden, in part at least, were taken from 140 to 150 exploratory plug drilled holes, about 53 of which were within the pit area. These reports were made by drillers from cuttings and returns from the driling operations. They purported only to report the driller's rough estimate of the nature and thickness of penetrated formations. And, they were admittedly consistent with the idea that the penetrated overburden could be removed with heavy dirt-moving equipment.

Geological logs were also made from cores taken from these and other borings in the vicinity. These logs were made by the companies' geologists to define the top and extent of the ore body for the purpose of determining whether the ore could be most economically mined by

underground tunneling or by the surface stripping method. These core logs were not shown to the contractor when it was considering its bid and contract. Both parties emphasize the importance of the information disclosed by these logs, and take widely different views concerning the interpretation to be placed upon them. Specifically, the contractor makes reference to thirteen of the logs taken from drill holes within the pit area. They interpret them to show 18 to 30 feet of hard rock above the stripping line or top of the ore body.[1]

At the same time, the companies interpret the same core logs to show not more than a depth of 10 feet of hard rock to be excavated, and demonstrate their interpretations by the use of charts and profiles. They say the core logs were, in any event, made and compiled to show the depth of the ore and not to reflect the hard rock above, and were therefore of no importance in determining the nature of the material to be excavated.

Careful examination of these logs and all accompanying data leaves us with the impression that they are susceptible to either interpretation, depending upon the approach and methods of computation. In any event, it is clear that both the drilling reports and geological logs were inconclusive as to the extent of hard rock to be excavated. Indeed, there is nothing in the record from

[1] Hole #71 shows 30′ of sandstone
Hole #69 shows 30′ of sandstone
Hole #68 shows 28′ of sandstone
Hole #84 shows 23′ of sandstone
Hole #85 shows 18′ of sandstone
Hole #87 shows 26′ of sandstone
Hole #43 shows 21′ of sandstone
Hole #67 shows 20′ of sandstone
Hole #62A shows 18′ of sandstone
Hole #82 shows 21′ of sandstone
Hole #77 shows 20′ of sandstone
Hole #79 shows 18′ of sandstone
Hole #78 shows 18′ of sandstone

which it may be said that the companies withheld pertinent knowledge peculiarly available to them.

To be sure, actionable fraud cannot be predicated upon unforeseen difficulties arising from misjudgment of facts equally available to parties to the contract. Nor can it arise out of mere differences of opinion concerning the facts upon which the parties contract. In an arms-length transaction like ours, neither party owes a duty to advise the other in the consummation of a contract. They are free to drive a hard albeit honest bargain. Thus, the company owed no duty to speak simply because it entertained an opinion or even a conviction concerning the nature of the material to be excavated while knowing that the contractor entertained another view and was acting upon it. The company could remain silent while the contractor labored under its misapprehension of material facts. See 3 Restatement, Torts, §551; Cole v. Parker, 5 Utah 2d 263, 300 P.2d 623.

But even so, the trial court's judgment does not rest upon the failure to disclose peculiar knowledge, nor does it turn upon the failure to speak when the Company was at liberty to sit silently by. Rather, the trial court's judgment is based primarily upon positive representations of material facts which the companies actually believed to be untrue. The mischief lies not in the failure to disclose peculiar knowledge, but in actively inducing the contractor to contract with the knowledge or belief that it was laboring under a misapprehension of the material facts. It is indeed the law in Utah as elsewhere that positive assertions to induce a contract which the maker reasonably believes to be untrue constitutes fraud and deceit. See Pace v. Parrish, 247 P.2d 272; Leasure v. Hughes, 178 Pac. 696; First National Bank of Coyle v. Horsley, 49 P.2d 495.

It is fairly plain from the record that Vice-President Sullivan was convinced that large quantities of hard rock would be encountered in the stripping operation. For, indeed, in his report to the Company on April 7, before the contractors visited the mine site, Sullivan had stated that the "bottom 30 to 40 percent (of the proposed pit) will probably require blasting, which is estimated to cost approximately 60c per yard." Pruess' report to the Board on the economics of strip mining in May 1955, after the contractor's 29c bid had been submitted, also indicated his belief that the cost of removing the "bottom two-thirds or one-half of the cubic yardage * * * could well rise over 50c." It is thus fairy inferable from the whole record that in considering the economics of strip mining over the underground method, the companies assumed that the bottom 30 to 40 percent of the pit area would be hard rock. And there was evidence to the effect that when on May 17, 1955, the contractors met with Sullivan and Pruess to negotiate for the contract, both Sullivn and Pruess indicated that the Contractor's earth-moving equipment was sufficient, and that they wouldn't even need to use their shovels. There was testimony to the effect that Sullivan and Pruess did say that there was "some sandstone overlaying the ore that in all probability they would want us to move while we were there, but they would negotiate another price for that if they wanted us to remove it." A cross section or specification exhibit was used at the conference to demonstrate the top of the sandstone, and the contractors were told that they were to strip down to the top of the sandstone, and that the interval between the top of the sandstone and the top of the ore was the material that "in all probability they would negotiate a price for us to move."

From all of this, the trial court concluded that at the time of the May 17 meeting, Sullivan and Pruess reasonably knew that the contractors were assuming that the material to be excavated could be moved by earth-moving machinery, and believing such assumption to be untrue, actively induced the contractors to contract on that basis. These purposeful misrepresentations and inducements to contract under a misapprehension of the material facts constituted actionable deceit, and since in these circumstances, the information and acts of Sullivan and Pruess were the information and acts of the companies whom they represented, the findings and conclusions of the trial court in this respect are clearly correct.

And these findings are not affected by the contract provisions which purport to confine the representations to those in the written contract. Such prophylactic provisions, being against the public interest, are unenforceable. See Roy Klossner Co. v. McIntire, 301 SW2d 197; Miller v. Troy Laundry Machinery Co., 62 P.2d 975; Restatement, Contracts, §573. And for the same reason, the acceptance of the monthly checks on condition that they are in full settlement of the accounts would not operate to exculpate the companies.

The court awarded damages to the appellee on the basis of "loss of bargain," or the ascertained reasonable value of the excavated hard rock rather than "out-of-pocket loss." And, this seems to be a permissable measure of damages for deceit in Utah and elsewhere. Adler v. Cosier, 168 P. 83; Hecht v. Metzler, 48 P. 37; Kinnear v. Prows, 16 P.2d 1094. See also Annot. 124 A.L.R. 37; Restatement, Torts, §549; McCormick on Damages, §121. From competent evidence, the court ascertained that the

reasonable value of excavating the disputed 705,622 cubic yards of hard rock was 91c per cubic yard. The appellants do not challenge the formula used. They do say, however, that the best evidence of the reasonable value of the work performed is the appellees' own cost, and there was no evidence of it. They further say with emphasis that the loss of bargain or reasonable value is determinable by ascertaining the extra cost by which appellees' profits were diminished, and that the trial court's determination allowed the plaintiffs to recover the profit on the extra work, and such is not a proper element of the loss of bargain.

It is of course true that costs have a direct bearing upon the reasonable value of the work, and there was no direct evidence of the appellees' cost of removing the unanticipated hard rock. But there was credible evidence that the reasonable value of moving the material was from 90c to $1.25 per cubic yard, and that these computations included costs plus a reasonable profit. While the appellees' actual cost may well have been a more accurate method of determining reasonabe value, no objections were made to this testimony — indeed, no contravailing evidence was offered until after the court had announced its decision. We think the court's determination of the reasonable value of the removal of the hard rock is supported by competent evidence and it will not be disturbed.

The court restricted recovery to the reasonable value of excavations prior to the amendment of March 17, 1956, after hard rock had been actually encountered and the appellees knew that the representations with respect thereto were inaccurate or untrue. The court accordingly awarded damages for the reasonable value of 68,000 cubic

yards of hard rock excavated prior to March 17, on the basis of an adjusted unit price, or a total of $49,810.00, less $16,994.00 heretobefore paid, at the rate of 29c per cubic yard.

The appellees have appealed from that part of the judgment which denies recovery for the reasonable value of the entire 705,622 cubic yards of hard rock. The contention is to the effect that they could not have waived or contracted away the fraud until it was discovered after the contract was fully performed. They say that after discovery of the true facts, but not the fraud, they proceeded to perform the contract under an assumed mutual mistake of fact and at the risk of heavy penalties for failure to complete on time; that had it known of the deceit, it would not have acted as it did in making the amendment; and that the amendment is thus infected by the original deceit and cannot operate to preclude full recovery for fraud and deceit in the inducement of the contract, citing United States v. Atlantic Dredging Company, 253 U.S. 1.

It is of course true that one does not waive fraud until he discovers it, or should have in the exercise of due care. And, it is also a rule of salutary application in cases of this kind that a defrauded party to a partially executed contract does not waive his right to claim the benefits of his bargain by continuing to perform the contract after discovering the fraud, unless he affirmatively indicates his intention to do so. See cases collected 13 A.L.R. 2d 807, 846, §6. The trial court recognized what is equally true, that an amendment to a contract which is tainted with the fraud of the original contract is also a nullity. The court reasoned, however, that the contractor's ignorance of the Company's deception was immaterial after

the March amendment; for inasmuch as the contractor knew the exact nature of the material to be encountered, and received additional consideration by way of an extension of time, it could under no "stretch of the imagination" be said to be relying upon the original misrepresentations in agreeing to the amendment. In the words of the trial court, the contractor could not recover damages for the period following the March 17 amendment, "not because there had been a full discovery of the fraud on that date, but because there had been a new contract with additional consideration prospectively operating which the plaintiffs cannot question because they then had no right to rely on the original misrepresentations. * * * it didn't matter whether plaintiffs knew that the original misrepresentation was intentionally deceitful or not." Thus, the trial court's judgment with respect to prospective damages was made to rest squarely upon the absence of the essential element of reliance, Pace v. Parrish, 247 P.2d 273; Restatement, Torts, §537, not upon a waiver of the fraud. The March amendment did not constitute a waiver but positive evidence of nonreliance.

This reasoning of the trial court is said to be directly contra to the reasoning and conclusions in the Atlantic Dredging Company case on indistinguishable facts. The facts in that case are strikingly similar to our own, but that suit in the Court of Claims was essentially on contract for the difference between the cost of excavating done and the amount received under the contract, not in tort for loss of bargain, as here. The court held that the continued performance of the contract after knowledge of the true facts and until the deception was discovered, did not bar recovery. But, while the contractor relied upon the government's misrepresentation, there was no charge

or finding of fraud, and reliance thereon could not have been an essential element of the right of recovery, as here. The basic difference in the two cases lies in the nature of the claims and the relief sought, and the essential ingredients of the right of recovery in the two cases.

On the whole, the trial court in our case was avowedly influenced by the obvious maneuvering of the parties after discovery of the true facts culminating in the amendatory agreement. Significance was attached to the fact that the contractors entered into the amendatory contract without asserting or even reserving the right to claim additional compensation for hard rock excavated while their counsel at the same time was preparing a formal demand for extra compensation to be submitted immediately after securing additional consideration by way of extension of time and extra compensation for additional excavation. And while this does not indicate a disposition not to waive a right to extra compensation, it does without doubt indicate that the contractor was proceeding with full knowledge of the true facts — that it was making the most of a hard bargain.

Significance was also given to the fact that the contractor continued to submit invoices for excavations, based on the contract price of 29c per cubic yard, and to accept payment therefor on the expressed condition that it was in full settlement for the excavation covered by the submitted invoices. We agree with the trial court that the contractor cannot recover the benefit of his bargain after he learned of the true facts and contracted prospectively in the face of such knowledge.

The court was concerned lest the March amendment operate as a waiver to bar the damages accrued before

discovery of the true facts and the execution of the amendment. As "unthinkable" as it seemed to the trial court that the contractor should receive extra compensation for excavation of hard rock after discovery of the true facts, and was no longer relying upon the Company's representation, it seemed "almost equally far fetched" to bar the contractor for full compensation for work done prior to the March amendment, unless the clear terms of the amendment itself or some rigid rule precludes a court of equity from drawing a distinction between the two periods. In that respect, it is sufficient to say that the contractor could not have waived the fraud until it was discovered, and it could not be precluded from recovering upon it until it ceased to rely upon it. Since admittedly the contractor did not discover the fraud until after the performance of the contract and did not rely upon it after the March amendment, the trial court's judgment is clearly right.

Finally, the appellant companies complain of the allowance of interest on the sum of $44,912.12, tendered by check on January 8, 1957, on condition that it should "constitute a release and waiver of all claims by the contractor against the Company, its officers, agents and employees." The contractor retained the check until March 28, when it returned it, stating that it would not accept it in full payment of its claim for two reasons: (1) it was based on an erroneous computation of the amount due; and (2) the companies had no "legal right to withhold payment of an amount admittedly due, to try to obtain release of any and all further claims." After the check was again tendered upon the same conditions, the contractor replied, acknowledging that it was based upon the correct computations, but still refusing to accept it in final payment

of all claims against the companies. The trial court held that the companies had no right to withhold the final payment of the amount admittedly due on condition that the contractor waive other claims against the companies, and the contractor was therefore entitled to interest on the amount of the check from the date of the conditional tender on January 8, 1957 to the unconditional tender on February 10, 1958.

True, the amount due was not liquidated until April 16, 1957, but in Utah the right to interest is not to be determined by whether the damages are liquidated or unliquidated, but whether the injury and consequent damages are complete. Wunderlich Contracting Co. v. United States, 240 F.2d 201. The court correctly, we think, awarded interest from the date the amount tendered was due and payable, to-wit, January 8, 1957.

The judgment is affirmed.

I hereby acknowledge receipt of six copies of the within Petition for Writ of Certiorari this ..... day of March, 1960.

.....of
PARSONS, BEHLE, EVANS & MOFFAT
Attorneys for Respondents
Kearns Building
Salt Lake City, Utah